



LOUISIANA DEPARTMENT OF INSURANCE

JAMES J. DONELON
COMMISSIONER

JUDGMENT

In the Matter of

PROGRESSIVE BUILDINGS, L.L.C. and GENESIS LIFE, L.L.C.

vs.

LOUISIANA WORKERS' COMPENSATION CORPORATION

Docket No. 2018-01

APPEARANCES:

Larry S. Bankston, Bankston & Associates, LLC for Appellant (Progressive/Genesis)

Ronnie L. Johnson, David R. Dugas, McGlinchey Stafford, PLLC for Appellee (LWCC)

PROCEDURAL HISTORY:

Larry S. Bankston, on behalf of Mallett Air Conditioning & Electrical, L.L.C. ("Mallett Air") and Best Buy Industries, L.L.C. ("Best Buy"), filed complaint number 714117 with the Louisiana Department of Insurance ("LDI") on July 2, 2018. Mr. Bankston complained of a decision by the Louisiana Workers' Compensation Corporation ("LWCC") to decline to write workers' compensation insurance policies for Mallett Air and Best Buy. The LDI notified Mr. Bankston, by letter dated August 1, 2018, that the Commissioner of Insurance has authority to review LWCC cancellations and non-renewals¹ but not denials of applications. Accordingly, lacking the authority to review the issue complained of, the LDI closed complaint number 714117 without further action.

Mr. Bankston, on behalf of Progressive Buildings, L.L.C. ("Progressive"), filed complaint number 716651 with the LDI on July 27, 2018. Mr. Bankston complained of an LWCC decision to cancel workers' compensation policies insuring both Progressive and Genesis Life, L.L.C. ("Genesis"). On August 2, 2018, Mr. Bankston, on behalf of Progressive and Genesis, submitted appeals of the cancellations to the LDI.

¹ La. R.S. 23:1415

The Commissioner of Insurance conducted a hearing beginning on September 18, 2018 and continuing on September 28, 2018. Following the hearing, the parties submitted post-hearing briefs.

The actions of LWCC in declining to write workers' compensation policies insuring Mallett Air and Best Buy are not part of this appeal and accordingly, are not discussed in this ruling.

HOLDING:

DONELON, JAMES J., Commissioner of Insurance.

Progressive and Genesis appealed the LWCC cancellation of their workers' compensation insurance policies. For the reasons that follow, I affirm the cancellations.

LWCC issued policies of workers' compensation insurance insuring Progressive and Genesis on May 5, 2018. Notices of Cancellation for the Progressive and Genesis policies were issued on June 4, 2018 with an effective cancellation date of August 6, 2018. Cancellation of commercial insurance, when a policy has been in effect less than sixty days, is effected by mailing or delivering written notice to the insured at least sixty days before the cancellation effective date.²

These policies were in effect less than sixty days. The notices of cancellation were mailed more than sixty days before the effective cancellation date. The cancellations complied with the procedural requirements of the insurance code.

I next turn to consideration of whether the reason for the cancellations was permissible. The Insurance Code provides for a sixty-day cancellation period on commercial policies³ in order to allow the insurer an opportunity to complete a thorough underwriting review of the proposed risk. It is within that first sixty days that the insurer should fully evaluate the proposed risk and determine whether it is acceptable to the company. Insurers have broad discretion in what elements they consider during underwriting. For LWCC, Louisiana law enumerates specific elements that LWCC may consider during underwriting.⁴

² La. R.S. 22:1267(C)(1)

³ Id.

⁴ La. R.S. 23:1409

The failure or refusal by any applicant or insured to fully and accurately disclose to the corporation information concerning the applicant's ownership, change of ownership, operations, or payroll, including allocation of payroll among state and federal compensation programs, classification of payroll, and any other information determined by the board to be important in determining proper rates shall be sufficient ground for the corporation to deny an application or to nonrenew or terminate an existing policy.⁵

Included in the permissible grounds for cancellation of an existing policy are inaccurate or incomplete disclosure of ownership, operations, payroll, and classification of payroll. As LWCC may cancel an existing policy for the inaccurate or incomplete disclosure of these items, it certainly follows that the information disclosed, or not disclosed, as the case may be, may be considered by LWCC in their evaluation of the risk.

As Insurance Commissioner, I am keenly aware of the impact ownership has on the operations of a company. The LDI must approve officers, directors, and trustees for all domestic regulated entities.⁶ Review and prior approval of such persons is intended to ensure the competent administration of such entities. The legislature clearly intended to allow LWCC to consider a company's ownership when making decisions to terminate an existing policy by including ownership in the list of things eligible for consideration.⁷

Here, the owner of Progressive and Genesis is Chester Lee Mallett. Mr. Mallett is also a former owner of Mallett, Inc. Mr. Mallett was the owner of Mallett, Inc. when Mallett, Inc. purchased a policy of workers' compensation insurance from LWCC in 2005. That previous Mallett, Inc. policy was found by LWCC to have been rated based upon information provided by Mallett, Inc. that was either inaccurate or incomplete. The policy premium was initially quoted at \$8,117. After conducting an audit, LWCC determined the actual premium should have been \$1,226,539. The difference in the quoted premium and the actual premium was due to the underreporting of payroll and misclassification of expenses. These same issues were identified in the audits of Progressive and Genesis.

As ownership is something LWCC may consider, LWCC was within its rights to take into account Mr. Mallett's involvement in these companies being mindful of LWCC's previous experience with a company which had been owned by Mr. Mallett.

⁵ Id.

⁶ La. Admin. Code Title 37 § 5101, et seq.

⁷ La. R.S. 23:1409

LWCC conducted a pre-audit of Progressive and Genesis and was concerned with their assertions regarding payroll, operations, and classification of payroll. LWCC requested records from Progressive and Genesis by letter dated May 18, 2018. LWCC notified the CPA for Progressive and Genesis on June 1, 2018 that certain records had not been provided. As such, the policies would be pending cancellation due to the lack of production. Notices of Cancellation were issued on June 4, 2018. Some additional records were eventually submitted to LWCC, however, they raised even more concerns about the accuracy of statements made by Progressive and Genesis.

LWCC identified numerous problems in their review of the companies' statements and records. The problems are thoroughly detailed in the post-hearing brief submitted by LWCC and include payroll misclassification, excessive mileage reimbursements, excessive donations, interchange of labor between companies, and wage discrepancies.

In one example of such a problem, [REDACTED], a Progressive employee, was reported to have been paid wages totaling \$17,750 for 2017. Progressive reported that Ms. [REDACTED] was paid an additional \$94,450 in mileage reimbursements for the same time period. The result being 84% of payments to Ms. [REDACTED] in 2017 were not considered in calculating the company's premium. In order for these payments to have been proper, and her wages excluded from premium calculation as requested by Progressive, Ms. [REDACTED] would have had to drive over 176,542 miles that year which equates to an average of 3,395 miles per week. This distance is the equivalent of an Iowa, Louisiana to Los Angeles, California round-trip every week. This is an estimated fifty-four hour round-trip. If this amount of driving occurred as reported, Ms. [REDACTED] would have been paid hourly wages below minimum wage.

In another example of the concerns discovered during the pre-audit, Progressive reported 2017 wages for [REDACTED] totaling \$16,863. Progressive also paid Mr. [REDACTED] an additional \$54,089 in mileage reimbursements in 2017. The result being 76% of payments to Mr. [REDACTED] being excluded from the calculation of workers' compensation premium.

In additional examples of the payroll discrepancies uncovered during the pre-audit, Genesis paid [REDACTED] nearly double his wages in mileage reimbursement. [REDACTED] and [REDACTED], both listed as clerical workers by Genesis, were paid more in mileage reimbursement than wages. All of these examples point toward the under-reporting of payroll with a resulting under-allocation of premium.


LWCC had justifiable reason to be concerned with the records and statements of Progressive and Genesis. LWCC must ensure that rates charged are adequate⁸ in order to not only protect the financial solvency of LWCC, but also to protect all workers compensation policyholders in Louisiana.⁹ LWCC could not accurately rate the risk for Progressive and Genesis in light of the inconsistencies found in the audit.

Progressive and Genesis failed to provide complete and accurate information to LWCC. This information was necessary in order to properly rate the risk for which these companies were applying for coverage. LWCC is required to charge adequate rates.¹⁰ As LWCC was unable to confirm the exact scope of the risk, there was no possible way to confirm the adequacy of their rates.

Due to the failure of Progressive and Genesis to fully and accurately provide responses to the audit, the discrepancies identified in LWCC's review of those responses that were provided, and in an effort by LWCC to comply with its statutory duty to ensure the collection of adequate rates, LWCC was within its rights to cancel these policies.

AFFIRMED

Judgment read, rendered, and signed in Baton Rouge, Louisiana this 19 day of November, 2018.



JAMES J. DONELON
Commissioner of Insurance

⁸ La. R.S. 23:1391(B)

⁹ Pursuant to La. R.S. 23:1395, LWCC is protected by the Louisiana Insurance Guaranty Association (LIGA) fund.

¹⁰ La. R.S. 23:1391(B)